APPENDIX A
(307 F (2d) 330)

UNITED STATES OF AMERICA Appellant,

v.

WASHINGTON TOLL BRIDGE AUTHORITY, d/b/a Washington State Ferries, Appellee.

No. 17379.

United States Court of Appeals, Ninth Circuit.
July 31, 1962.

Rehearing Denied Sept. 26, 1962.

Louis F. Oberdorfer, Asst. Atty. Gen., Lee A. Jackson, Melva M. Graney, and Joseph Kovner, Attys., Tax Division, Dept. of Justice, Washington, D. C., Brockman Adams, U. S. Atty., Seattle, Wash., and C. W. Billinghurst, Asst. U. S. Atty., Tacoma, Wash., for appellant.

John J. O'Connell, Atty. Gen., for State of Washington, and John W. Riley, Deputy Atty. Gen., for State of Washington, Olympia, Wash., for appellee.

George N. Hayes, Atty. Gen., for State of Alaska, and Michael M. Holmes, Asst. Atty. Gen., State of Alaska, Juneau, Alaska, and appearing for State of Alaska as amicus curiae.

Before CHAMBERS, BARNES, HAMLEY, HAMLIN, JERTBERG, MERRILL, KOELSCH, BROWNING and DUNIWAY, Circuit Judges.

JERTBERG, Circuit Judge.

This case draws in issue the constitutional and statutory application of the federal transportation excise taxes to the fares paid for the transportation of persons and property on vessels operated by appellee, W hington Toll Bridge Authority, d/b/a Washir on State Ferries.

Specifically, appellant, the United States, instituted an action in the court below to recover unpaid federal transportation excise taxes assessed against the appellee for the first three quarters of 1957. The District Court denied recovery. Its opinion is reported at 190 F. Supp. 95. The jurisdiction of the District Court is founded on § 7402(a) of the Internal Revenue Code of 1954. The jurisdiction of this Court rests on Title 28 U.S.C.A. §§ 1291-4.

The Washington Toll Bridge Authority was established, and its powers and duties prescribed, by the laws of 1937, Chapt. 173, p. 654.[1] It is an instrumentality of the State of Washington and exists, for the most part, as a self-supporting entity with all of the rights and liabilities of a common carrier. Since 1951, it has operated an extensive ferry system on the Puget Sound and its tributaries between local and international points. This system is perhaps the largest of its kind in the United States. Its necessity is dictated by the geography of the area and it provides a vital link in the State's highway system, carrying passengers and property over various

[1] The enabling Act may be found in Washington Revised Code, Section 47.60 et seq.

bodies of water to connect the State highways and thereby avoiding circuitous land travel. The ferry system operated by the Authority is an expansion of services formerly provided, in part, by King County, State of Washington, a municipal corporation, and its successor, King County Ferry District No. 1, and, in greater part, by the Puget Sound Navigation Company, a private corporation.

Since the commencement of the Authority's ferry operations, the United States has pursued it for taxes imposed by §§ 4261, 4271 and 4291, Title 26 U.S.C.A. of the Internal Revenue Code of 1954.[2]

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[2]The pertinent provisions of these Sections are as follows:

"§ 4261. **Imposition of tax**

"(a) Amounts paid within the United States—There is hereby imposed upon the amount paid within the United States for taxable transportation (as defined in section 4262) of any person by rail, motor vehicle, water, or air a tax equal to—

* * *

* * * * * * *

"(d) **By whom paid.**—Except as provided in section 4262, the taxes imposed by this section shall be paid by the person making the payment subject to the tax."

"§ 4271. **Imposition of tax**

"(a) Property other than coal.—There is hereby imposed upon the amount paid within or without the United States for the transportation of property, except coal, by rail, motor vehicle, water, or air from one point in the United States to another, a tax equal to 3 per cent of the amount so paid.

* * * * *

"(d) **By whom paid.**—The taxes imposed by this section shall be paid by the person making the payment subject to the tax."

"§ 4291. **Cases where persons receiving payments must collect tax**

"Except as otherwise provided in sections 4231 and 4264(a), every person receiving any payment for facilities or service on which a tax is imposed upon the payor thereof under this chapter shall collect the amount of the tax from the person making such payment. * * *"

These provisions are comprehensive in application. They impose a tax upon the "amount paid" for the transportation of persons or property "by water" and other means. The tax is made payable by the person paying for the transportation and the person receiving the payment is obligated to collect the tax. From June 1951 until April 1, 1952, the Authority collected and paid similar taxes under protest. Thereafter, it entered into extended negotiations with the Commissioner of Internal Revenue which culminated in an agreement whereby past claims were compromised. In order to adjudicate the question the Authority agreed to raise its fares in an amount equal to the tax and to place the amount in escrow and, in turn, the Commissioner agreed to promptly initiate litigation. Pursuant to this agreement an amount equal to the tax was collected by the Authority for the first three quarters of 1957 and placed in escrow. The United States made its assessment and filed suit.

The findings of fact by the District Court are based upon a stipulation with exhibits and the testimony of Darrell Hedges, executive secretary of the Authority. These findings are not strenuously disputed and are substantially, though more detailed, the same as heretofore recited. The District Court, following a previous decision of this Court, infra, reached the conclusion that the operation of the ferry system by the Authority was a governmental function and, as such, was immune from federal taxation. In addition, the District Court held that

these tax provisions were not intended by Congress to apply to state-operated ferry systems. The correctness of these conclusions of law are the primary concern of this appeal.

In United States v. King County, 281 F. 686 (9th Cir. 1922), this Court held that the ferry system operated by King County was immune from a federal tax of the type here involved because it was "an interference with and a burden upon the governmental functions of the state."[3]

Contrary to the assertion of appellant that the Washington Toll Bridge authority exists as a "separate entity," specially created by the State of Washington rather than as an "agency" of the State in the full sense of that term, we shall consider the questions involved in this appeal on the basis of the District Court's conclusion that the Authority is an instrumentality of the State of Washington authorized to operate the ferry system as an integral part of the highway system of the States.

It was recognized at the time of the decision in King County, as it is now, that the control over,

[3]After holding that the operation of a ferry was strictly a governmental function, the Court said, at p. 690;

> "'It is true that in the [instant] case the tax was not imposed directly upon the county of King, but upon the persons paying to it the transportation charges; but it is obvious that the collection of those charges is at least one of the means which the county must resort to for the purpose of paying the costs of the ferry, which, if insufficient, must be made good from its other revenues or by general taxation. Hence it seems plain that the federal tax here involved is an interference with and a burden upon the governmental functions of the state."

and the operation of, ferries is historically a governmental function. It was thought at the time of such decision and for some years thereafter in order to preserve the independence of the State, that the federal government could not constitutionally impose a tax on State activities determined to be governmental in character as opposed to activities determined to be proprietary. In more recent years, however, this distinction has been recognized as an unsatisfactory and inconclusive guide for determining the immunity of a State activity from the federal taxing power. In Helvering v. Gerhardt, 304 U. S. 405, 58 S. Ct. 969, 82 L. Ed. 1427 (1938), the question for decision was whether the imposition of a federal income tax on salaries received by employees of the Port of New York Authority placed an unconstitutional burden on the States of New York and New Jersey. The Port Authority is a bi-state corporation created by compact between New York and New Jersey and approved by the Congress of the United States. The Authority constructed vehicular bridges over waters of New York Harbor or adjacent to it, and vehicular tunnels under the Hudson River. The Authority collected tolls from the users of such facilities. It is obvious that the bridges and tunnels formed a part of the highway systems of the two States and that the construction and operation of the same was a governmental function. It was contended that the imposition of a federal income tax on the salaries paid to employees of the Authority

constituted an interference with and a burden upon the States in the performance of a governmental function. This contention was rejected by the Supreme Court in sustaining the imposition of the tax. In the course of its opinion, the Court stated (at pp. 419-420, 58 S. Ct. at p. 975) that prior judicial pronouncements of that Court establish

> "two guiding principles of limitation for holding the tax immunity of state instrumentalities to its proper function. The one, dependent upon the nature of the function being performed by the state or in its behalf, excludes from the immunity activities thought not to be essential to the preservation of state governments even though the tax be collected from the state treasury. * * * The other principle, exemplified by those cases where the tax laid upon individuals affects the state only as the burden is passed on to it by the taxpayer, forbids recognition of the immunity when the burden on the state is so speculative and uncertain that if allowed it would restrict the federal taxing power without affording any corresponding tangible protection to the state government; even though the function be thought important enough to demand immunity from a tax upon the state itself, it is not necessarily protected from a tax which well may be substantially or entirely absorbed by private persons."

Further, in the course of its opinion, the Court stated, at p. 422, 58 S. Ct. at p. 976:

> "* * * The state and national governments must co-exist. Each must be supported

by taxation of those who are citizens of both. The mere fact that the economic burden of such taxes may be passed on to a state government and thus increase to some extent, here wholly conjectural, the expense of its operation, infringes no constitutional immunity. Such burdens are but normal incidents of the organization within the same territory of two governments, each possessed of the taxing power."

In New York v. United States, 326 U. S. 572, 66 S. Ct. 310, 90 L. Ed. 326 (1946), the Supreme Court held that the State of New York was not immune from the tax imposed by § 615 of the Revenue Act of 1932 on the sale of mineral waters taken from Saratoga Springs owned and operated by the State. The State of New York contended that it was immune from the tax because it was engaged in the disposition of its natural resources and that such activity was governmental in character. While it can be reasonably asserted that in the sale of mineral waters the State was engaging in a proprietary instead of a governmental function, the Court took occasion to state (at p. 580, 66 S. Ct. at p. 313), as follows:

"* * * To rest the federal taxing power on what is 'normally' conducted by private enterprise in contradiction to the 'usual' governmental functions is too shifting a basis for determining constitutional power and too entangled in expediency to serve as a dependable legal criterion. The essential nature of the problem cannot be hidden by an attempt to separate

manifestations of indivisible governmental powers."

In concluding its opinion, the Court stated, at p. 583, 66 S. Ct. at p. 314:

> "* * * * So we decide enough when we reject limitations upon the taxing power of Congress derived from such untenable criteria as 'proprietary' against 'governmental' activities of the States, or historically sanctioned activities of government, or activities conducted merely for profit, and find no restriction upon Congress to include the States in levying a tax exacted equally from private persons upon the same subject matter."

[1, 2] From the teachings of the above cited cases[1] it is manifest that immunity of the State activity here involved from the taxing power of the federal government cannot be successfully asserted on the *ad hoc* basis that such activity involves a governmental function. Attention must be focused on the specific activity and on the nature and extent of interference with, or burden upon, the State, and this interference or burden must be "actual and substantial," and not the creature of speculation and conjecture.

Applying these teachings to the instant case, it is difficult to understand how the present tax unduly interferes with the State of Washington's function

[1] See also Wilmette Park Dist. v. Campbell, 338 U. S. 441, 70 S. Ct. 195, 94 L. Ed. 205 (1949) and Allen v. Regents of The University System of Georgia, 304 U. S. 439, 58 S. Ct. 980, 82 L. Ed. 1448 (1938).

of government. The record is void of any tangible evidence to this effect. The tax involved is made payable by the persons who pay for the transportation while the State's only obligation is to collect the tax. Since the King County case, the States have been forced to accept the role of tax collector for the federal government on numerous occasions, e. g., income and admission taxes. See Commonwealth of Massachusetts v. United States, 296 F. 2d 336 (1st Cir. 1961). Such collections have not unduly interfered with, or placed a burden upon, the states' function of government. And because the tax is absorbed by the persons using the ferry system, it imposes no undue economic burden upon the State of Washington. Any indirect economic consequences incident to such a tax, such as a decrease in the volume of business if the toll is raised or absorption by the State if it is not, are speculative in nature, not "actual or substantial." Here the Authority raised its toll in an amount equal to the tax and there is no claim that this has affected the operation of its ferry system in any manner. Consequently, we hold that the Authority is not constitutionally immune from the duty to collect and to remit to the United States Government the federal excise taxes on transportation here involved. This holding requires us to, and we do, overrule the earlier holding of this Court in the King County case.

[3] Having concluded that no immunity from the duty to collect and remit the taxes exists, the

next question is whether Congress intended them to apply to a State-operated ferry system. For this purpose the provisions concerning the tax on persons and property will be considered separately. Section 4271 imposes the tax upon the "amount paid" for the transportation of property "by water" and other means. It is imposed on the person paying for said transportation. Section 4272(a) discloses that this tax does not apply to amounts paid to a person who is not "engaged in the business of transporting property for hire."[5] These Sections were construed in United States v. State Road Department of Florida, 255 F. 2d 516 (5th Cir. 1958). There the Court recognized the power of Congress to tax non-discriminatorily activities of a State and, conversely, to exempt a State from such a tax. It held that the exemption in § 4272(a) applied to a State-operated ferry system because it was not "engaged in the business of transporting property for hire."[6] In view

[5]This exemption in § 4272 reads as follows:

"(a) Not in business for hire.—The tax imposed under section 4271 shall apply only to amounts paid to a person engaged in the business of transporting property for hire, including amounts paid to a freight forwarder, express company, or similar person, but not including amounts paid by a freight forwarder, express company, or similar person for transportation with respect to which a tax has previously been paid under such section."

[6]The Court's opinion reads (at p. 518) as follows:

"In light of the present day state of the cases; we do not doubt the power of Congress to tax non-discriminatorily many activities in which a state may engage. It is equally clear, however, that Congress can exempt the state from the burden of taxes that otherwise fall uniformly on others. Construing the language of this exemption section as best we can, we conclude that Congress recognized that there would be persons or entities

of the historical nature of a State-operated or controlled ferry system and its function as a link in a highway system, this Court agrees with the holding of the Court of Appeals for the Fifth Circuit, construing § 4272(a) as exempting the tax otherwise made payable under § 4271 for the transportation of property.[7]

Section 4261 imposes the tax on persons. It is likewise made payable by the person paying for the transportation. However, this provision has no exemption equivalent to § 4272(a) where payments are made to persons not engaged in the business of transporting for hire. Nor do any of the exemptions for the tax imposed on persons, as specified in § 4263, apply here.[8] Hence, neither § 4272(a) nor the State Road Department of Florida case is authority for reasoning that the tax on persons is not applicable to State-operated ferry systems. Congress must have intended to, and did, treat the tax on persons and property differently, enacting statutes broad in scope to encompass the subject matter here involved, but exempting therefrom the tax on property and not the tax on persons.

It may be argued that only "persons" receiving

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that charged for transportation of property not 'engaged in the business of transporting property for hire.' Otherwise there would be no need for Section 4272 at all. We think the State Road Department is such an entity."

[7] §§ 4271 and 4272 were repealed by § 4 of the Tax Rate Extension Act of 1958, P.L. 85—475, 72 Stat. 260.

[8] The exemptions specified in § 4263 include commutation travel, small vehicles and aircraft on nonestablished lines, fishing trips, certain organizations, and members of the armed forces.

the payments are obligated to collect the tax under § 4291 and that a State is not such a person. However, a State has been considered a person under comparable statutes.[9] Any other construction of the word "person" would be unreasonable once it is determined that the tax sought to be collected applies and is within the constitutional power of Congress to impose. The Authority's argument that a state is not such a "person" is untenable and assumes a factual situation not disclosed by the record. This Court concludes that §§ 4261 and 4291 require passengers of the ferry system to pay the tax and the Authority to collect it and pay it over to the United States.

[4, 5] We find no merit in the Authority's contention that the decision of this Court in the King County case is *res judicata* in this case. This defense is inapplicable for the reasons that a different tax year is involved, a different statute is involved, and different parties are involved. Similarly, the doctrine of collateral estoppel is inapplicable. As stated in Commissioner of Internal Revenue v. Sunnen, 333 U. S. 591, at p. 599, 68 S. Ct. 715, 92 L. Ed. 898 (1948):

> "* * * That principle [collateral estoppel] is designed to prevent repetitious lawsuits over matters which have once been decided and which have remained substantially static,

[9] Sims v. United States, 359 U. S. 108, 79 S. Ct. 641, 3 L. Ed. 667 (1959); Wilmette Park Dist. v. Campbell, 338 U. S. 411, 70 S. Ct. 195 (1949); Commonwealth of Massachusetts v. United States, supra.

factually and legally. It is not meant to create vested rights in decisions that have become obsolete or erroneous with time, thereby causing inequities among taxpayers."

The judgment of the District Court is reversed and the cause is remanded to the District Court with directions to enter judgment in accordance with the views expressed herein.

CHAMBERS, Chief Judge (concurring).

The foregoing opinion is technically excellent and probably interprets correctly the precedents since our case of United States v. King County, 9 Cir., 281 F. 686.

If this were a court that could decide what the law ought to be, I would dissent.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Endorsed
Filed
SEP 26 1962
Frank H. Schmid,
Clerk

UNITED STATES OF AMERICA, *Appellant*, v. WASHINGTON TOLL BRIDGE AUTHORITY, d/b/a WASHINGTON STATE FERRIES, *Appellee.*	No. 17379 ORDERS

ORDERS ON "ALTERNATIVE MOTION OF APPELLEE FOR ORDER TO REMAND FOR FURTHFR PROCEEDINGS, TO CLARIFY MANDATE, AND FOR OTHER INTERIM RELIEF" AND ON APPELLEE'S "PETITION FOR REHEARING."

Before: CHAMBERS, BARNES, HAMLEY, HAMLIN, JERTBERG, MERRILL, KOELSCH, BROWNING and DUNIWAY, Circuit Judges.

1. The alternative motion of appellee "for order to remand for further proceedings, to clarity mandate, and for other interim relief" is denied;.

2. The petition of appellee for rehearing is denied.

Gilbert H. Jertberg
Circuit Judge

APPENDIX C
(190 F Supp. 95)

UNITED STATES OF AMERICA, Plaintiff,

v.

WASHINGTON TOLL BRIDGE AUTHORITY, dba Washington State Ferries, Defendant.

No. 2243.

United States District Court
W. D. Washington, S. D.
Dec. 14, 1960.

Charles P. Moriarty, U. S. Atty., Seattle, Wash., and Charles W. Billinghurst, Asst. U. S. Atty., Tacoma, Wash., for plaintiff.

John J. O'Connell, Atty. Gen., Jennings P. Felix, Special Asst. Atty. Gen., for defendant.

BOLDT, District Judge.

The basic question presented in this case is whether under the agreed facts defendant Authority and the users of its ferry services are exempt from the federal taxes imposed by 26 U.S.C. § 4261 (transportation of persons) and § 4271 (transportation of property). Recovery upon assessments against the Authority based on its passenger and freight ferry traffic from January 10, 1957 to September 30, 1957 is the immediate objective of the action. Jurisdiction is vested in this court by 26 U.S.C. § 7402.

The Washington State Toll Bridge Authority was established by statute as a state agency in 1937.

RCW 47.56.020. In 1949 the state legislature empowered the Authority to acquire and operate a system of ferries on and across Puget Sound and its tributary waters. RCW 47.60.010. Pursuant thereto the Authority purchased vessels, terminals, routes and other property from various private concerns in the business of operating ferries. The Authority presently operates about 23 vessels on various routes throughout the Puget Sound and into Canadian waters. This water transportation system is probably the largest of its kind in the United States.

The Authority commenced transportation services in June, 1951, and from then until April 1, 1952 it collected and paid under protest federal transportation taxes, as required by a ruling of the Commissioner of Internal Revenue. When the federal government sought to collect transportation taxes and penalties for the period April 19, 1952 to December 30, 1954, extended negotiations concerning the matter were undertaken between the parties. An arrangement resulted whereby the Authority agreed to resume collection from patrons of amounts equal to the transportation taxes and to deposit such amounts in escrow pending judicial determination of the applicability of the above cited tax statutes to the ferry operations of the Authority. The Commissioner agreed to promptly initiate litigation to that end and all back tax claims against the Authority were compromised for $75,000. On January 10, 1957 the Authority began to place in escrow an

amount equal to the tax the government contended was due and taxable. The Commissioner then authorized the commencement of this action for the collection of taxes assessed for the first three quarters of 1957 and for application thereto of the funds in escrow.

[1] Defendant contends that the only procedure maintainable for adjudication of the law issue referred to is under 26 U.S.C. § 6672 which provides for the imposition and collection of a 100% penalty where a party obligated to collect a tax wilfully fails or refuses to do so. Recovery of penalties admittedly is not sought in this action and for that reason defendant urges that dismissal is required.

[2] The agreement of the parties, arrived at in a good faith effort to provide for adjudication of disputed questions of law, makes it clear that the parties intended to avoid a penalty proceeding wherein wilfulness is an essential element. "Wilfully" as used in section 6672 has been defined as "without reasonable cause" or "capriciously." See Kellems v. United States, D.C.D. Conn. 1951, 97 F. Supp. 681. Procedure as in the action now before the court was contemplated by the parties' agreement. In these particular circumstances, plaintiff properly followed the necessary procedural requirements in the bringing of this action for collection of the assessed excise transportation taxes out of the escrow fund and defendant may not challenge that procedure which raises the basic issue of the

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applicability of the cited tax statutes to the ferry operations of defendant.

[3] On the merits of the basic issue, defendant contends that the ferry operations of the Authority are immune from federal taxation because in essence they are an integral and necessary part of the state highway system, the providing of which has been long recognized as a state governmental function. Plaintiff contends that in taking over an extensive ferry system, previously operated as a private business over a period of many years, the Authority entered into a proprietary activity which is not entitled to the state's immunity from taxation.

[4, 5] It is well settled that the maintenance of a highway system, including necessary bridges, by a state government or a subdivision thereof, is an exercise of a traditional and essential governmental function. Commissioner of Internal Revenue v. Harlan, 9 Cir., 1935, 80 F. 2d 660, and State ex rel. Wash. Navigation Co. v. Pierce County, 1935, 184 Wash. 414, 51 P. 2d 407. Where a ferry serves as an essential link in a highway, clearly it is as much an integral part of the highway system as a bridge. United States v. State Road Dept. of the State of Florida, 5 Cir., 1958, 255 F. 2d 516; United States v. King County, Wash., 9 Cir., 1922, 281 F. 686.

[6] While the taxes in question are imposed on users and merely collected by carriers, when the transportation service is performed by a state agency in exercise of an essential governmental func-

tion a federal tax on the service is an unlawful interference with and burden upon the state function. United States v. King County, Wash., supra.

The considerable size and extent of the Puget Sound ferry system, in and of itself, does not change the basic nature of the service and function performed by the ferries operated in the system. By means of the ferries the Authority provides in effect a public highway across water, fulfilling public transportation requirements dictated by the geography of the area. The irregular shoreline of the inland waters of Puget Sound separates large areas of land and important centers of population within the state of Washington. An extensive ferry system is the only practical means of providing convenient public transportation connecting many highway terminals and permitting the passage of persons and property between numerous cities and towns of the state. Without such water transportation the public, in normal and essential communication, would be put to extensive additional land travel to reach many places within the state and residents of a considerable number of populated islands would have no public means of access to other areas of the state. The highway transportation needs of the people of Washington and reasonable social and economic development of the state fully justify the nature and extent of the ferry system provided by the defendant Authority.

[7, 8] The fact that substantial parts of the ferry system were previously operated as a private business does not change the basic nature of the governmental function involved. Since early times the establishment of ferries across streams and on navigable waters, for normal transportation purposes as distinguished from sightseeing, amusement and the like, has not been considered a matter of purely private right and function. It has long been deemed a public function permitted only by the consent, express or implied, of sovereign authority. See 22 Am. Jur., Ferries § 3, p. 554. A true governmental function remains so whether performed directly by the sovereign or by a private concern under permission and control of the sovereign.

[9] As contended by plaintiff, the trend of modern case authority has been to confirm, and perhaps extend, the power of congress to tax many activities in which a state may engage. State of South Carolina v. United States, 1905, 199 U. S. 437, 26 S. Ct. 110, 50 L. Ed. 261; State of Ohio v. Helvering, 1934, 292 U. S. 360, 54 S. Ct. 725, 78 L. Ed. 1307; Helvering v. Powers, 1934, 293 U. S. 214, 55 S. Ct. 171, 79 L. Ed. 291; Helvering v. Gerhardt, 1938, 304 U. S. 405, 58 S. Ct. 969, 82 L. Ed. 1427; Allen v. Regents, 1938, 304 U. S. 439, 58 S. Ct. 980, 82 L. Ed. 1448; State of New York v. United States, 1946, 326 U. S. 572, 66 S. Ct. 310, 90 L. Ed. 326. See also United States v. State of California, 1936, 297 U. S. 175, 56 S. Ct. 421, 80 L. Ed. 567. How-

ever, all of the cited cases directly or by implication acknowledge that there are activities in which a state may perform its traditional governmental functions immune from federal taxation. Under the particular circumstances and peculiar geographic conditions under which its services are performed, the operation of the Puget Sound Ferry system by defendant Authority is such a governmental activity of the state of Washington. In the performance of such functions the state and its agencies are immune from federal taxation, including transportation taxes provided for in 26 U.S.C. §§ 4261 et seq. and 4271 et seq.

Findings of fact, conclusions of law and judgment in accordance herewith may be presented at the convenience of counsel.

APPENDIX D
(281 F 686)

UNITED STATES v. KING COUNTY, WASH., et al.

(Circuit Court of Appeals, Ninth Circuit.
July 3, 1922.)

No. 3790.

In Error to the District Court of the United States, for the Northern Division of the Western District of Washington; Edward E. Cushman, Judge.

Action by the United States against King County, Wash., a municipal corporation, and others. Judgment for defendants, and the United States brings error. Affirmed.

Thomas P. Revelle, U. S. Atty., and John A. Frater, Asst. U. S. Atty., both of Seattle, Wash. (Carl A. Mapes, Sol. of Internal Revenue, of Washington, D. C., and Robert M. Foster, Sp. Atty., Bureau of Internal Revenue, of counsel), for the United States.

Malcolm Douglas and Howard A. Hanson, both of Seattle, Wash., and L. L. Thompson, Atty. Gen. of Washington, for defendants in error.

Before ROSS, MORROW, and HUNT, Circuit Judges.

ROSS, Circuit Judge. The court below having sustained a demurrer to the complaint as amended and given judgment accordingly, the sole question

here is as to the sufficiency of the plaintiff in error's pleading. The action was brought to recover of King county, state of Washington, and its officers, a transportation tax on account of moneys paid to them for the transportation of freight and passengers on certain ferryboats maintained and operated by the county.

A statute of the state of Washington authorized any county within the state to, among other things—

> "operate and maintain a ferry across or wharf at any unfordable stream, lake, estuary or bay within or bordering on said county, together with all the necessary boats, grounds, roads, approaches and landings necessary or appertaining thereto, with full jurisdiction and authority to operate and maintain the same free or for toll, by and under the direction and control of the board of county commissioners of such county and as said board shall by resolution determine." Laws Wash. 1895, p. 341, § 2; Laws Wash. 1899, p. 39, § 1; Remington's Code Wash. 1915, § 5013.

By section 500 of the United States Revenue Act of 1917 (40 Stat. 314) it was, among other things, provided that from and after November 1, 1917, there should be—

> "levied, assessed, collected, and paid a tax equivalent to three per centum of the amount paid for the transportation by rail or water * * * when in competition with carriers by rail or water of property by freight consigned from one point in the United States to another,

> * * * and a tax equivalent to eight per centum of the amount paid for the transportation of persons by rail or water * * * on a regular established line when in competition with carriers by rail or water from one point in the United States to another, or to any point in Canada or Mexico, where the ticket therefor is sold or issued in the United States, not including the amount paid for commutation or season tickets for trips less than thirty miles, or for transportation the fare for which does not exceed 35 cents, and a tax equivalent to ten per centum of the amount paid for seats, berths and staterooms * * * on vessels. * * *"

The next section provided that the taxes imposed by section 500 should be paid by the person, corporation, partnership, or association paying for the services or facilities rendered. A similar requirement is made by section 501(a) of the Revenue Act of 1918 (Comp. St. Ann. Supp. 1919, § 6309⅓b). By section 503 it is provided, among other things, that every person, corporation, partnership, or association, receiving any payments referred to in section 500, should collect the amount of the tax so imposed and should make monthly returns under oath in duplicate and pay the same to the collector of internal revenue of the district in which the principal office or place of business is located. By section 500 et seq. of the Revenue Act of 1918 (Comp. St. Ann. Supp. 1919, § 6309⅓a et seq.) the rates levied, assessed, and to be collected and paid after April 1, 1919, were increased, but with similar provisions

in other respects, in so far as concerns the present case, as specified in the act of 1917.

Two contentions are made on behalf of the plaintiff in error: First, that the maintenance and operation of the ferries by the municipality was and is an ordinary business enterprise, as distinguished from a strictly governmental function, which latter (it is practically conceded) is protected by the federal Constitution against taxation; and, secondly, that if it be conceded that the maintenance and operation of the ferry in question is a purely governmental function, engaged in by the municipality and its officers for the benefit of the public at large, still the tax involved is imposed, not upon the state instrumentalities, but upon the persons paying for the transportation services, and that the state authorities could be legally required to collect the moneys for such transportation and pay the tax over to the United States.

We do not understand that the establishment and operation of a ferry by any governmental body can be properly regarded as a business enterprise, nor that there is or can be anything private about it. We understand it to be the duty of the government, whether national, state, county, or city, to provide suitable roads, bridges, and ferries for the convenience of the public, and that when such a government undertakes to do so, and to itself operate them, it is in the exercise of a strictly governmental function, and that the public have the right to the

use thereof upon complying with the terms and conditions legally prescribed. It has always been so, as we understand the law. In the case of Hart v. Bridgeport, 11 Fed. Cas. 681, No. 6,149, 13 Blatchf. 289, Judge Shipman, in speaking of the line of demarcation between public governmental duties and private or corporate duties, said at page 682:

> "Public duties are, in general, those which are exercised by the state as a part of its sovereignty, for the benefit of the whole public, and the discharge of which is delegated or imposed by the state upon the municipal corporation. They are not exercised, either by the state or the corporation, for its own emolument or benefit, but for the benefit and protection of the entire population. Familiar examples of such governmental duties are the duty of preserving the peace, and the protection of property from wrongdoers, the construction of highways, the protection of health, and the prevention of nuisances. The execution of these duties is undertaken by the government, because there is a universal obligation resting upon the government to protect all its citizens, and because the prevention of crime, the preservation of health, and the construction of means of intercommunication are benefits in which the whole community is alike and equally interested. Private or corporate powers are those which the city is authorized to execute for its own emolument, and from which it derives special advantage, or for the increased comfort of its citizens, or for the well ordering and convenient regulation

of particular classes of business of its inhabitants, but are not exercised in the discharge of those general and recognized duties which are undertaken by the government for the universal benefit."

That it is a principle of the common law that ferries are publici juris, and can be granted by the sovereign power, see Conway et al. v. Taylor's Executor, 66 U. S. (1 Black) 603, 17 L. Ed. 191; Fanning v. Gregoire et al., 57 U. S. (16 How.) 524, 14 L. Ed. 1043; Mills v. St. Clair Co. Com'rs, 3 Scam. (Ill.) 53; Carroll v. Campbell, 108 Mo. 550, 17 S. W. 884. In McQuillin on Municipal Corporations, vol. 1, § 227, p. 514, it is said:

"The use of streets is designed for the public at large, as distinguished from the legal entity known as the city, or municipal corporation. The management of highways may be characterized as municipal duties relating to governmental affairs. During the early periods of English history the highways were laid out and constructed directly by the government. The government assumed the immediate and sole management of them, and this was recognized as an essential governmental function. In this country control of highways is primarily a state duty. They are everywhere maintained for the use of the public at large. 'To the commonwealth here, as to the king of England, belongs the franchise of every highway as a trustee for the public, and streets regulated and repaired by the authority of a municipal corporation are as much highways as are rivers, railroads, canals,

or public roads laid out by authority of the quarter sessions. In England a public road is called the king's highway, and, though it is not usually called the commonwealth's highway here, it is so in contemplation of law, for it exists only by force of the commonwealth's authority.' "

At page 893, § 406, the same author says:

"A ferry may be regarded as the continuation of a public highway from one side of the water over which it passes to the other. In this sense it is a substitute for a bridge, and its end and use is the same. A ferry is a right or franchise which cannot be exercised in England without the king's license, and in this country it cannot be exercised without a legislative grant. In law it is treated as a franchise. It does not belong to the riparian proprietor of the soil. The state may authorize a municipal corporation to establish and license ferries."

To the same effect are the decisions in the cases of East Hartford v. Hartford Bridge Co., 10 How. 511, 13 L. Ed. 518; People v. S. F. & A. R. Co., 35 Cal. 606; City of New York v. Starin, 106 N. Y. 1, 12 N. E. 631; Hackett v. Wilson, 12 Or. 25, 6 Pac. 652; Reid v. Lincoln County, 46 Mont. 41, 125 Pac. 429; Patterson v. Wollmann, 5 N. D. 608, 67 N. W. 1040, 33 L. R. A. 536.

The South Carolina case (199 U. S. 437, 26 Sup. Ct. 110, 50 L. Ed. 261, 4 Ann. Cas. 737), referred to by counsel on both sides, involved an excise tax levied by the general government on the sale of intoxicating liquor by agents designated by the state

for its disposal, and the court—three justices dissenting—held that the business so entered upon and conducted by the state was of a private business nature, and therefore not exempt from an excise tax. But that, in our opinion, was a wholly different case from the present one. The prevailing opinion did not undertake to overrule any of the numerous preceding decisions of the same court upon the general subject, but to distinguish them. One of the preceding cases was that of Ambrosini v. United States, 187 U. S. 1, 23 Sup. Ct. 1, 47 L. Ed. 49. In that case what was called the Dramshop Act of the Legislature of Illinois, passed for the purpose of regulating the liquor traffic in protection of the public, and certain ordinances of the city of Chicago enacted thereunder, required bonds to be given by applicants as prerequisites to the issue of licenses permitting sales. The court held that the granting of such licenses was a strictly governmental function, and that the giving of the bonds was a part of the same transaction, and to tax either would be to impair the efficiency of the state and municipal action, and therefore was unconstitutional.

In United States v. Baltimore & Ohio R. Co., 17 Wall. 322, 21 L. Ed. 597, the Supreme Court held that the United States could not tax revenues received by a municipal corporation of the state of Maryland from funds invested by it in stock of a railroad company, for the reason that such investment was made by the city in its governmental ca-

pacity for the general benefit of its citizens. So, in the instant case, it seems clear to us that the establishment and operation of the ferry in question by the county of King under legislative grant of power for the benefit of the public was in pursuance of its strictly governmental function.

It is true that in the present case the tax was not imposed directly upon the county of King, but upon the persons paying to it the transportation charges; but it is obvious that the collection of those charges is at least one of the means which the county must resort to for the purpose of paying the costs of the ferry, which, if insufficient, must be made good from its other revenues or by general taxation. Hence it seems plain that the federal tax here involved is an interference with and a burden upon the governmental functions of the state.

The judgment is affirmed.

APPENDIX E

FEDERAL STATUTES

INTERNAL REVENUE CODE—26 USC

§ 4261. Imposition of tax

(a) Amounts paid within the United States.—There is hereby imposed upon the amount paid within the United States for the transportation of persons by rail, motor vehicle, water, or air within or without the United States a tax equal to 10 percent of the amount so paid.

* * *

(d) By whom paid.—The taxes imposed by this section shall be paid by the person making the payment subject to the tax.

§ 4264. Special rules

(c) Payment of tax.—Where any tax imposed by section 4261 is not paid at the time payment for transportation is made, then, under regulations prescribed by the Secretary or his delegate, to the extent that such tax is not collected under any other provision of this subchapter—

(1) Such tax shall be paid by the person paying for the transportation or by the person using the transportation;

* * *

§ 4271. Imposition of tax

(a) Property other than coal.—There is hereby imposed upon the amount paid within or without the

United States for the transportation of property, except coal, by rail, motor vehicle, water, or air from one point in the United States to another, a tax equal to 3 percent of the amount so paid.

* * *

(d) By whom paid.—The taxes imposed by this section shall be paid by the person making the payment subject to the tax.

§ 4272. Exemptions

(a) Not in business for hire.—The tax imposed under section 4271 shall apply only to amounts paid to a person *engaged in the business of transporting property for hire,* including amounts paid to a freight forwarder, express company, or similar person, but not including amounts paid by a freight forwarder, express company, or similar person for transportation with respect to which a tax has previously been paid under such section. (Emphasis supplied.)

§ 6203. Method of assessment

The assessment shall be made by recording the liability of the taxpayer in the office of the Secretary or his delegate in accordance with rules or regulations prescribed by the Secretary or his delegate. Upon request of the taxpayer, the Secretary or his delegate shall furnish the taxpayer a copy of the record of the assessment.

§ 6651. Failure to file tax return

(a) Addition to the tax.—In case of failure to file any return required under authority of subchap-

ter A of chapter 61 (other than part III thereof), of subchapter A of chapter 51 (relating to distilled spirits, wines, and beer), or of subchapter A of chapter 52 (relating to tobacco, cigars, cigarettes, and cigarette papers and tubes), or of subchapter A of chapter 53 (relating to machine guns and certain other firearms), on the date prescribed therefor (determined with regard to any extension of time for filing), unless it is shown that such failure is due to reasonable cause and not due to willful neglect, there shall be added to the amount required to be shown as tax on such return 5 percent of the amount of such tax if the failure is for not more than 1 month, with an additional 5 percent for each additional month or fraction thereof during which such failure continues, not exceeding 25 percent in the aggregate.

§ 6671. Rules for application of assessable penalties

(a) Penalty assessed as tax.—The penalties and liabilities provided by this subchapter shall be paid upon notice and demand by the Secretary or his delegate, and shall be assessed and collected in the same manner as taxes. Except as otherwise provided, any reference in this title to "tax" imposed by this title shall be deemed also to refer to the penalties and liabilities provided by this subchapter.

(b) Person defined.—The term "person," as used in this subchapter, includes an officer or employee of a corporation, or a member or employee of a partnership, who as such officer, employee, or mem-

ber is under a duty to perform the act in respect of which the violation occurs.

§ 6672. Failure to collect and pay over tax, or attempt to evade or defeat tax

Any person required to collect, truthfully account for, and pay over any tax imposed by this title who willfully fails to collect such tax, or truthfully account for and pay over such tax, or willfully attempts in any manner to evade or defeat any such tax or the payment thereof, shall, in addition to other penalties provided by law, be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over. No penalty shall be imposed under section 6653 for any offense to which this section is applicable.

APPENDIX F

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Appellant*, vs. WASHINGTON TOLL BRIDGE AUTHORITY, d/b/a WASHINGTON STATE FERRIES, *Appellee.*	No. 17379

ALTERNATIVE MOTION OF APPELLEE FOR ORDER TO REMAND FOR FURTHER PROCEEDINGS, TO CLARIFY MANDATE, AND FOR OTHER INTERIM RELIEF

COMES NOW the Washington Toll Bridge Authority, d/b/a Washington State Ferries, Appellee, and respectfully makes this Motion for an order providing:

1. That the opinion of this Court in this cause dated July 31, 1962, be withdrawn pending entry of further Findings of Fact and Conclusions of Law by the trial court as to whether or not the increment in tolls charged by the Washington State Toll Bridge Authority for the use of the facilities of the Washington Ferry System has imposed a direct and substantial financial burden upon the State of Washington.

2. That this cause be remanded to the United States District Court for the Western District of

Washington, Southern Division, for such further proceedings as are necessary to make and enter such additional Findings of Fact and Conclusions of Law, with directions to the trial court to certify its additional Findings to this Court as soon as practicable.

3. That this Court make provisions for reconsideration of the Opinion in this cause dated July 31, 1962, in the light of such additional Findings of Fact and Conclusions of Law as may be certified to this Court pursuant to the Appellee's Petition for Rehearing on file herein.

4. Appellee further requests that if the Appellee's Petition for Rehearing is denied, the order of the court denying the petition clarify the court's mandate in each of the foregoing particulars so as to indicate:

(a) If the trial court finds that application of 26 USC 4261 to Appellee's activities does result in a direct and substantial interference with Appellee's governmental function, is the statute unconstitutional?

(b) In any event, are the assessments issued by Appellant against the Appellee upon which this action is based valid or invalid?

5. In any event, and if Appellee's Petition for Rehearing is denied before hearing of this Motion, then Appellee respectfully requests this Court to stay the mandate indicated by the Court's Opinion

of July 31, 1962, until after hearing of this Motion, and that provision be made for such hearing.

STATEMENT OF POINTS AND AUTHORITY IN SUPPORT OF THIS MOTION

This Motion is based upon affidavits of R. Gilman Smith, Consulting Traffic Engineer, Darrell Hedges and M. O. Martin, attached hereto, and the following Authority:

I

The procedure requested by this Motion lies within the inherent and sound discretion of this Court, as specified by 28 USC 2106, providing:

> "The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, *or require such further proceedings to be had as may be just under the circumstances.* June 25, 1948, c. 646, 62 Stat. 963." (Emphasis supplied.)

II

This Court's Opinion of July 31, 1962, indicates that the record does not disclose the extent of the interference with the Appellee's governmental function of maintaining toll facilities within the public highway system of Washington which the federal law in question works upon the State of

Washington. The evidence required to meet the test thus propounded by this Court was not material, according to *United States v. King County* (9th Cir., 1922) 281 Fed. 686, which this Court specifically overruled. In overruling *King County*, this Court made the question of the extent of interference of the tax in question a pivotal and ultimate question of fact, for the first time in the history of the statute in question. This Court thus declared:

> "Attention must be focused on the specific activity and the nature and extent of interference with or burden upon the state, and this burden must be actual and substantial and not the creature of speculation and conjecture." (Id., p. 6)

III

The evidence which is available to meet the test found to be the pivotal question in this Court's Opinion is outlined in the supporting affidavits of R. Gilman Smith, Darrell Hedges and M. O. Martin. The supporting affidavits indicate, and Appellee further respectfully declares, that it can prove that the interference and burden upon Appellee's governmental function which result from the Act as construed and applied in the Court's Opinion of July 31, 1962, is direct and substantial; that the tax is *not* absorbed by the persons using the system; and that the tax *does* impose an undue economic burden on the state. The foregoing evidence will specifically disprove the contrary assumptions made by this Court in its Opinion (Id., p. 7) that:

"* * *, such collections have not unduly interfered with, or placed a burden upon the state's function of government and because the tax is absorbed by the persons using the Ferry system, it imposes no undue economic burden upon the State of Washington." (Opinion, id., 7)

IV

The lower court did not consider and could not have considered evidence which would prove the nature and extent of the interference with the governmental operations of the State of Washington which resulted or would result from the increment in tolls charged for use of the facilities in question, because (1) such evidence was not then material in view of this Court's long-standing decision in *United States v. King County*; (2) since 1957 and since the time of entry of the pre-trial order by the court below and entry of the trial court's judgment, the Appellee has been afflicted with severe financial problems requiring direct monetary subsidization from public revenues other than tolls in the amount of $9,307,718.91. In addition, much indirect financial support is given the System by state government in order to fulfill its governmental obligation to maintain the highway system.

V

Accordingly, the failure to introduce evidence pertinent to the issue of impairment of the Appellee's governmental operations is not due to the neglect

of Appellee. On the contrary, the record here clearly indicates that in order for justice to be done, Appellee should be afforded the judicial opportunity to demonstrate the facts in support of this contention now made pivotal as a result of this Court's opinion overruling United States v. King County, if the Court will not take judicial notice of such facts as requested in Appellee's Petition for Rehearing.

CERTIFICATE

Counsel hereby certifies that this Motion is made in good faith and on grounds believed to be meritorious and is not offered to embarrass, hinder or delay the parties or the Court. Additional grounds and argument in support of this Motion are set forth in Appellee's Petition for Rehearing simultaneously filed herewith.

WHEREFORE, Appellee respectfully moves for an order of this Court in the particulars indicated above.

DATED this 28th day of August, 1962.

JOHN W. RILEY,
Special Assistant Attorney General
535 Central Bldg., Seattle, Washington

Counsel for Appellee Washington State Toll Bridge Authority and Washington State Ferries, a division thereof.

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Appellant,

vs.

WASHINGTON TOLL BRIDGE AUTHORITY,
d/b/a WASHINGTON STATE FERRIES,
Appellee.

No. 17379

AFFIDAVIT OF MR. DARRELL HEDGES, EXECUTIVE SECRETARY OF THE WASHINGTON STATE TOLL BRIDGE AUTHORITY, IN SUPPORT OF THE MOTION OF APPELLEE FOR AN ORDER TO REMAND AND OTHER RELIEF AND IN SUPPORT OF APPELLEE'S PETITION FOR REHEARING

UNITED STATES OF AMERICA
STATE OF WASHINGTON } ss.
County of Thurston

DARRELL HEDGES, being first duly sworn, on oath deposes and says:

I am Darrell Hedges, executive secretary of the Washington State Toll Bridge Authority. I make this affidavit in support of the Appellee's Motion for an order to remand and other relief and in support of the Appellee's Petition for Rehearing.

I have served as the executive secretary of the Washington State Toll Bridge Authority since May, 1954. In this capacity I have the responsibility for carrying out the policies of the Washington Toll

Bridge Authority and accordingly have and have had complete cognizance of the entire financial affairs of Washington State Ferries since 1954.

The Washington State Toll Bridge Authority is the parent state agency of the Washington State Ferry System. The facilities of the Washington State Ferry System are operated in coordination with other facilities established and maintained by the Washington Toll Bridge Authority. All these facilities are operated under the supervision of the Department of Highways. Each facility of the State Toll Bridge Authority is maintained and operated as an integral link in the public highway system of this state. Employees of Washington State Ferries are employees of Washington State and enjoy membership in the State Employees' Retirement System.

The entire operations of the Washington State Toll Bridge Authority and Washington State Ferries are dependent upon revenue bond financing. To retire these bond issues the Appellee has depended primarily upon revenues from tolls paid by its patrons. All of the bond issues in the history of the system provide that if revenue from the bonds is insufficient to meet debt service requirements, then increments in tolls to develop revenue sufficient to meet debt service requirements are required unless other tax funds are made available to augment revenue.

Since 1957 grants and appropriations of general public revenues have been necessary to enable the Ferry System to meet normal debt service re-

quirements as an alternative to increments in tolls which would have discouraged traffic, thereby impairing Appellee's ability to carry out its statutory function of development and maintenance of a public highway system which is adequate to meet the normal communications requirements of the citizens of the State of Washington. The nature and extent of these funds is described in the affidavit of M. O. Martin, the Controller and fiscal officer of Washington State Ferries.

DARRELL HEDGES.

SUBSCRIBED AND SWORN to before me this 28th day of August, 1962.

V. B. OTIS,
Notary Public in and for the State of Washington, residing at Olympia.

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Appellant*, vs. WASHINGTON TOLL BRIDGE AUTHORITY, d/b/a WASHINGTON STATE FERRIES, *Appellee.*	No. 17379

AFFIDAVIT OF MR. R. GILMAN SMITH, CONSULTING TRAFFIC ENGINEER OF THE WASHINGTON STATE TOLL BRIDGE AUTHORITY, IN SUPPORT OF THE MOTION OF APPELLEE FOR AN ORDER TO REMAND AND OTHER RELIEF AND IN SUPPORT OF APPELLEE'S PETITION FOR REHEARING

UNITED STATES OF AMERICA
State of New York } ss.
County of .....

R. GILMAN SMITH, being first duly sworn, deposes and says:

I am R. Gilman Smith, a member of the firm of W. C. Gilman & Company, Room 1115 at 115 Broadway, New York 6, New York. I make this affidavit in support of the motion of Appellee for an order to remand and other relief and in support of Appellee's Petition for Rehearing.

Since 1947 my firm has been retained by the State of Washington, Toll Bridge Authority, for various financial feasibility studies and since 1951

by Washington State Ferries as Independent Engineer for work including Financial Feasibility Studies, Estimation of Revenue and Tariff Predictions and other matters as specified in various bond resolutions.

I am a professional engineer specializing in the practice of traffic engineering including the estimate of traffic volumes for transit services including transit, ferry services, toll bridges and other toll facilities; financial feasibility estimates for rapid transit projects, toll bridges, ferry services, port facilities and parking projects; general traffic studies for urban and metropolitan areas including parking; coordinated transportation involving highways and transit; operational transit studies including fare structures, fare collection procedures, routing and service requirements, maintenance procedures and costs and related matters; valuation of transit properties; participation in matters before regulatory authorities; etc. I graduated from the University of Wisconsin in 1915, receiving a Bachelor of Science degree in Mechanical Engineering. From 1915 to 1916 I participated in postgraduate work in engineering at the Massachusetts Institute of Technology. I am a licensed professional engineer in the State of New York and a member of the Institute of Traffic Engineers.

In eighteen years as a partner in the W. C. Gilman & Company my work has been primarily in the transportation field. This has included local

and metropolitan area transit (street cars, trolley coaches, motor buses and various forms of rapid transit), ferry service, toll bridges, port facilities, small boat marinas and other facilities for which the financial feasibility is dependent on the volume of use by the public and the payment by such users of specified tolls, fares or other charges dependent on the extent and character of such use. I have supervised and also actively participated in all of this type of work carried on by W. C. Gilman & Company in this eighteen year period.

Specifically these assignments have included the following:

A. Preparation of estimates of the net productivity of upward adjustments in transit rates of fare (after allowance for losses in riding volume due to such fare increases) and submission of such estimates to regulatory authorities, including testimony in connection therewith for:
   - Milwaukee & Suburban Transport Corp.
   - Twin City Rapid Transit Company (Minneapolis-St. Paul)
   - Capital Transit Co. (Washington, D. C.)
   - Louisville Transit Co.
   - Surface Transportation Co. (New York City)
   - The Connecticut Company (Hartford & New Haven, Conn.)

B. Preparation of estimates of the net productivity of toll rate increases made by Washington State Ferries at various times

since the acquisition of the ferry system by the State of Washington in 1951.

C. Preparation of studies as to the financial feasibility of various projects based on estimated volume of use at specified rates of tolls or charges as established by us:

Tacoma Narrows Bridge

Fox Island Bridge (Pierce County, Washington)

Hood Canal Bridge (State of Washington)

Proposed bridge connecting Lopez and San Juan Islands (San Juan County, Washington)

Proposed bridge connecting Bainbridge Island with the Kitsap Peninsula near Bremerton (Washington).

Purchase of the ferry system of Puget Sound Navigation Co. by the State of Washington

Establishment of passenger and vehicle ferry service between Horseshoe Bay (Vancouver, B. C.) and Departure Bay on Vancouver Island

Establishment of an all purpose (passenger and vehicle) ferry service by the State of Alaska connecting Prince Rupert, B. C., with Skagway, Alaska, via Ketchikan, Wrangell, Petersburg, Juneau and Haines

Proposed bridge across the Fraser River at Agassiz (British Columbia)

Harbor improvements in Honolulu harbor

Small boat marina at Edmonds, Washington

Purchase of a new ferry by the Bridgeport (Conn.) and Port Jefferson Steamboat Company

Proposed passenger and vehicle ferry service between Freeport (Grand Bahama Island) and Miami, Florida

An internal passenger transportation facility to take persons to the top of the 600 foot Jefferson Memorial Arch now under construction in St. Louis

A proposed monorail rapid transit line along or immediately adjacent to Wilshire Boulevard in Los Angeles

A proposed monorail rapid transit line between Tel Aviv and Petach-Tikva, Israel.

I am now and have been since 1951 personally familiar with the financial condition of the Washington State Ferry System. It is a well known fact, of which there is no doubt, that the Washington State Ferry System is now and has been for several years last past in dire financial straits. The financial difficulty of the Washington Ferry System has required emergency disbursements by the Governor of the State of Washington from the Governor's Emergency Fund and other appropriations from general revenue by the legislature of the State of Washington.

In considering the financial feasibility of toll road, toll bridge, railroad, municipal transit, and maritime transit projects, it is a notorious fact and rule of definite predictability, accepted by traffic consultants everywhere that the higher the total

consideration required for use of a given facility, then the greater is the discouragement of use by patrons and potential patrons of those facilities.

In other words, every increase in tolls required for use of a toll bridge, a toll ferry or other transportation facility, even though modest in amount, will produce a decrease in volume of traffic over such a facility, with corresponding impairment of the financial ability of the facility or organization in question.

In my opinion the gradual increment in tolls required to maintain the operations of the Washington State Ferries over the years has been a substantial contributing factor in the curtailment of rate growth or actual reductions in the traffic flowing over the same facilities, which factor has directly and substantially contributed to the impairment of the financial ability of the Washington State Ferry System to meet its obligations, thereby necessitating financial subsidies from public funds other than toll revenue.

Specifically, it is my opinion that the increment in tolls occasioned by the increase in 1957 in amounts equal to the Federal Transportation Tax directly and substantially contributed to the subsequent impairment of the financial ability of the Washington State Ferry System to meet its obligations, directly necessitating substantial subsidies from general tax revenues of the State of Washington.

Your affiant further certifies that, if called upon, he would testify in support of the Appellee in the foregoing particulars and would assist the Appellee to present other evidence which would prove or tend to prove the foregoing contentions of your affiant.

R. GILMAN SMITH.

SUBSCRIBED AND SWORN to before me this 24th day of August, 1962.

PETER JAMES MCTAGUE,
Notary Public in and for the State of New York, residing at Queens County.

My commission expires March 30, 1963.

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Appellant,

vs.

WASHINGTON TOLL BRIDGE AUTHORITY,
d/b/a WASHINGTON STATE FERRIES,
Appellee.

No. 17379

AFFIDAVIT OF MELVIN O. MARTIN, CONTROLLER AND FISCAL OFFICER OF THE WASHINGTON STATE TOLL BRIDGE AUTHORITY, IN SUPPORT OF THE MOTION OF APPELLEE FOR AN ORDER TO REMAND AND OTHER RELIEF AND IN SUPPORT OF APPELLEE'S PETITION FOR REHEARING

UNITED STATES OF AMERICA
STATE OF WASHINGTON
County of King
} ss.

MELVIN O. MARTIN, being first duly sworn, on oath deposes and says:

I am Melvin O. Martin, Controller and Fiscal Officer of the Washington States Ferries, a division of the Washington State Toll Bridge Authority. I make this affidavit in support of the Appellee's Motion for an Order to Remand and other relief and in support of the Appellee's Petition for Rehearing in the above entitled cause.

I have served as the Controller and Fiscal Officer of the Washington State Ferries, a division of

the Washington State Toll Bridge Authority, since 1951. My responsibilities include supervision of all matters related to collection, disbursement and accounting of any and all funds of the Washington State Ferries, preparation of financial statements and reports, payrolls and other statistical data. All the financial records and accounts of the Washington State Ferries have been subject to my control and supervision since 1951.

The entire operation of the Washington State Ferries division of the Washington State Toll Bridge Authority is dependent upon revenue bond financing. To retire these bond issues, the Appellee depends upon revenues from tolls paid by its patrons. All of the bond issues in the history of the system provide that if net revenue from operations is insufficient to meet debt service requirements, then increases in tolls to develop net revenue sufficient to meet debt service requirements are required unless other funds are made available to augment net revenue.

Since 1957 grants and appropriations of general public revenues have been necessary to enable Washington State Ferries to meet its financial obligations without increasing tolls.

Since 1957 $9,307,718.91 has been paid by the Washington Legislature and from the Governor's Emergency Fund to the Washington State Ferries for expenses incurred in the operation of the State Ferry System.

Of the foregoing amount, $640,956.10 represents the payment of funds for the benefit of the Washington State Ferries during the 1957-1959 biennium pursuant to Chapter 271, Laws of 1957 of the State of Washington. This amount was derived from gasoline taxes paid into the Puget Sound Transportation Stabilization Fund created by Chapter 271 of the Laws of 1957 by an appropriation from the Legislature of $750,000.00. This same law provided that three-fourths of one per cent of the net tax amount of the motor vehicle fund was to be paid monthly as the same accrued. A total of $640,956.10 was thus credited to this fund during the 1957-1959 biennium. Of this amount, $512,522.95 was spent in the form of contributions of Washington State Ferries to the State Employees Retirement Fund, a normal payroll cost of Washington State Ferries at six per cent of the applicable wages from the payroll of Washington State Ferries. The remaining $128,-433.15 was spent in the form of contributions of Washington State Ferries to the Federal Internal Revenue Department, a normal payroll cost of Washington State Ferries covering employer's tax under the Federal Insurance Contributions Act. The Puget Sound Transportation Stabilization Fund and the amounts expended from it on the account of the Washington State Ferry system were intended for and were in fact utilized for the purpose of avoiding depletion of net revenues from other sources (i.e., tolls) in such a manner as to be unable to meet nor-

mal debt service requirements of outstanding revenue bond issues.

Of the foregoing amount of $9,307,718.91, $439,009.26 represents a payment of funds for and on account of the Washington State Ferry System during the 1959-1961 fiscal biennium pursuant to Chapter 271, Laws of 1957 of the State of Washington, as amended by Chapter 4, Laws of 1959, Ex. Sess., which reduced the appropriation from the Legislature to the Puget Sound Transportation Stabilization Fund to $500,000.00, and provided for contributions to the fund in amounts equivalent to one-half of one per cent of the motor vehicle fund to be paid monthly as the same accrued. This amount of $439,009.26 was expended during the biennium of 1959-1961 for the Ferry System for its State Retirement System costs and was necessary to prevent depletion of net revenues from other sources to a point below that necessary to meet debt service requirements.

Of the foregoing amount of $9,307,718.91, $322,228.06 represents a contribution from the Governor's Emergency Relief Fund during the 1959-1961 fiscal biennium which was necessary to meet debt service requirements. $350,000.00 represents a special motor vehicle fund appropriation by the Washington State Legislature for the 1959-1961 fiscal biennium and was necessary to meet debt service requirements.

$5,500,000.00 represents an interest free appropriation from the Motor Vehicle Fund by the Washington State Legislature to be repaid to the Motor Vehicle Fund from tolls when the 1957 Ferry System bond issue is retired.

$2,055,525.49 represents that portion of a $2,600,000.00 appropriation made by the 1961 Legislature for maintenance, operation and debt service during the 1961-1963 fiscal biennium which has been used as of June 30, 1962.

MELVIN O. MARTIN.

SUBSCRIBED AND SWORN to before me this 27th day of August, 1962.

JOHN W. RILEY,
Notary Public in and for the State of Washington, residing at Olympia.